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BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF
ROBERT JUNGARO,

Appellant,

v.

PUGET SOUND AIR POLLUTION
CONTROL AGENCY,

Respondent.

PCHB No. 77-79

FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND ORDER

PER W. A. GISSBERG:

A formal hearing on an appeal to review a \$250 civil penalty for allegedly violating respondent's outdoor fire regulations was held before Board members W. A. Gissberg and Chris Smith on September 12, 1977 in Seattle, Washington. David Akana presided.

Appellant appeared pro se and respondent was represented by Keith D. McGoffin.

Having heard the testimony, having examined the exhibits, and being fully advised, the Board makes the following

FINDINGS OF FACT

I

Respondent, pursuant to RCW 43.21B.260 has filed with this Board a certified copy of its Regulation I containing respondent's regulations and amendments thereto.

II

Attracted by a 150 foot high plume of blue colored smoke, respondent's inspector, on March 16, 1977, observed an outdoor fire three feet in diameter and consisting of lumber scraps which had been ignited by one George Dye, a "private contractor" doing work for appellant, Robert Jungaro, under a written contract. Although the fire occurred in the city limits of Everett upon property in which Jungaro was a part owner, he had not authorized or instructed Dye to burn nor was he aware of it. We give no weight to the hearsay statements of Dye to the effect that appellant had instructed him to "burn it," and note that when appellant learned of Dye's statements to respondent's inspector Dye was promptly fired for lying.

III

Respondent's inspector purports to have served appellant with notices of violation of Section 8.02(3) (burning prohibited materials), and Section 8.02(5) by posting the same on a "bulletin board" in the structure upon which Dye was working. Dye signed the notices of violation. Thereafter a notice of civil penalty in the amount of \$250 was mailed to appellant by certified mail.

IV

The pertinent parts of Sections 8.02 of respondent's Regulation I

FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

1 provide:

2 It shall be unlawful for any person to cause or allow any
3 outdoor fire:

4 (3) containing . . . any substance . . . which normally
5 emits dense smoke . . .

6 (5) in violation of any applicable law, rule or
7 regulation of any governmental agency having jurisdiction
8 over such fire.

9 V

10 Other than the testimony which characterized the fire to have been
11 of scrap lumber and that the color of the plume was 150 feet high, the
12 record is silent as to whether a fire of scrap lumber normally does or
13 does not emit dense smoke. It does not appear that respondent's
14 regulation prohibits the burning of scrap lumber per se unless it can
15 be said that such material "normally emits dense smoke."

16 VI

17 The ordinance of the City of Everett makes it unlawful for any
18 person to cause or allow any outdoor fire of the type here involved and
19 provides that it is prima facia evidence that the person who owns or
20 controls property on which a fire occurs has caused or allowed it.

21 VII

22 Any Conclusion of Law hereinafter stated which may be deemed a
23 Finding of Fact is hereby adopted as such.

24 From these Findings the Pollution Control Hearings Board comes to
25 these

26 CONCLUSIONS OF LAW

27 I

-6 It is true that when an outdoor fire occurs it is presumed by both

27 FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

1 respondent's regulations and the City of Everett ordinance that the
2 owner of the property on which it occurred has caused or allowed the fire.
3 That presumption is overcome, however, when the property owner presents
4 believable evidence that he neither allowed, knew of, nor ordered or
5 required the fire and that it was, in fact, started by one standing in
6 the relationship to him of independent contractor. At that point, the
7 burden of going forward with the evidence shifts back to respondent.
8 In the instant case, respondent rested and presented no rebuttal
9 evidence nor did it probe by cross examination, into the actual facts
10 behind appellant's assertion that Dye was a "private contractor."
11 The actual facts would have established whether the relationship between
12 appellant and Dye was that of employer-employee or independent contractor.
13 See Omoco Oil v. EPA, 9 ERC 1097.

14 In sum, the burden of proof, in civil penalty cases, is upon the
15 air pollution control agency. That burden of proof never changes. It
16 is merely aided by a rebuttable presumption that the owner of property on
17 which the fire occurred caused or allowed it.

18 II

19 Appellant did not violate respondent's regulations and the civil
20 penalty should therefore be stricken.

21 III

22 Any Finding of Fact which should be deemed a Conclusion of Law is
23 hereby adopted as such.

24 Therefore, the Pollution Control Hearings Board issues this

25 ORDER

26 The Notice and Order of Civil Penalty No. 3247 in the amount of

27 FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

1 \$250 assessed against the appellant Robert Jungaro is vacated and
2 stricken.

3 DATED this 19th day of September, 1977.

4 POLLUTION CONTROL HEARINGS BOARD

5 W. A. Gissberg
6 W. A. GISSBERG, Chairman

7 Chris Smith
8 CHRIS SMITH, Member

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27 FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER